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October 2, 2017

VIA ONLINE PORTAL

Larry Gottesman  
National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave NW (2822T)  
Washington, D.C. 20460

Re: FOIA Request – Section 702 Guidance

Dear Mr. Gottesman:

This is a request on behalf of The James Madison Project (“JMP”), The Daily Beast’s Executive Editor, Noah Shachtman (“Mr. Shachtman”), and The Daily Beast’s politics reporter, Betsy Woodruff (“Ms. Woodruff”)(hereinafter referred to jointly as “the Requesters”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*

This request seeks copies of U.S. Environmental Protection Agency (“EPA”) records, including cross-references, memorializing the following:

- 1) Instructions or guidelines – including verbal instructions memorialized in writing – relied upon by the EPA with respect to the use of information originally collected under Section 702 of the Foreign Intelligence Surveillance Act, including the circumstances in which such information can be used in criminal proceedings;
- 2) To the extent that the information does not fall within the scope of category #1, instructions or guidelines – including verbal instructions memorialized in writing – relied upon by the EPA with respect to restrictions that are to be applied to the use and dissemination of Section 702-derived information, including to what extent the EPA is obligated to disclose that the information was collected pursuant to Section 702 surveillance; and

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*James Madison, 1822*

- 3) To the extent that the information does not fall within the scope of category #1, instructions or guidelines – including verbal instructions memorialized in writing – relied upon by the EPA detailing restrictions to be applied to its authority to further disseminate Section 702-derived information originally provided to the EPA by another Federal agency.

The extent to which the distribution of Section 702-derived information is being properly handled remains of public concern. A recently declassified ruling by the Foreign Intelligence Surveillance Court outlined how the Federal Bureau of Investigation improperly shared raw Section 702-derived information with private contractors. <http://theweek.com/speedreads/701630/fisa-court-chided-fbi-sharing-nsa-data-americans-outside-contractors> (last accessed July 1, 2017). The relevance of these concerns has taken on greater significance given that Congress is currently evaluating whether, or at least to what extent, to reauthorize Section 702 authorities. <http://www.washingtontimes.com/news/2017/jun/4/fisa-section-702-reauthorization-uncertain-without/> (last accessed July 1, 2017). In addition, the EPA maintains its own law enforcement role, including work performed by its Criminal Investigation Division.

The scope of the searches should not be limited to EPA-originated records and should be construed to include records that are currently in the possession of a U.S. Government contractor for purposes of records management.

The Requesters are pre-emptively waiving any objection to the redaction of the names of any U.S. Government officials below a GS-14 position or whom otherwise were not acting in a supervisory position. The Requesters similarly waive any objection to redactions of the names of any U.S. Government contractors in a position of authority similar to that of a GS-13 series civilian employee or below.

In terms of all other third parties who work or worked for the U.S. Government and whose names appear in records responsive to this request, the Requesters submit that the privacy interests of those individuals have been diminished by virtue of their involvement in one or more of the U.S. Government functions described above as falling within the scope of this request. There is a recognized inverse relationship between the position of authority that a government employee holds and the strength of that employee's privacy interests. See Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); Jefferson v. Dep't of Justice, 2003 U.S. Dist. LEXIS 26782, \*11 (D.D.C. Nov. 14, 2003); see also Perlman v. Dep't of Justice, 312 F.3d 100, 107-109 (2d. Cir. 2002)(setting forth five factors to consider in weighing government employee's privacy interests against public interest in disclosure, including employee's rank and whether information sheds light on a government activity).

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The work performed by these U.S. Government third parties (whether they be Government officials or contractors) was part of their official responsibilities on behalf of the U.S. Government and was not of a personal nature. They served in a position of trust and authority to, among other things, detail the circumstances in which Section 702-derived information can be disseminated throughout the U.S. Government and the limitations that are supposed to be applied to the use of such information. Given that responsive records memorializing the work they performed will shed light on government activity, it would be reasonable to conclude that the relevant third parties' respective (and diminished) privacy interests are outweighed by the public interest in disclosure of the information indexed to their name.<sup>1</sup>

We are also requesting a waiver of or, at a minimum, a reduction in fees. First, for similar reasons as those described above, there is an overriding public interest in disclosure of responsive records. Second, the Requesters qualify – in their own respective right – for designation as representatives of the news media.

JMP is a non-partisan organization dedicating to promoting government accountability and the reduction of secrecy. <http://jamesmadisonproject.org/> (last accessed October 2, 2017). Mr. Shachtman is the Executive Editor of The Daily Beast, a New York-based media outlet with an estimated 40 million readers per month. Ms. Woodruff is a politics reporter for The Daily Beast, focusing on immigration, legal issue and federal law enforcement. <http://www.thedailybeast.com/company/about-us.html> (last accessed October 2, 2017).

The Requesters have the ability to disseminate information on a wide scale and intend to use information obtained through this FOIA request in an original work, particularly through news articles published by The Daily Beast. According to 5 U.S.C. § 552(a)(4)(A)(ii),

the term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

The Requesters can demonstrate their intent and ability to publish or otherwise disseminate information to the public. See Nat'l Security Archive v. Dep't of Defense, 880 F.2d 1381, 1386 (D.C. Cir. 1989). The Daily Beast maintains the ability to produce news articles explaining the content of any responsive records received as part of this request. In the event that fees are ultimately assessed, do not incur expenses beyond \$25 without first contacting our office for authorization.

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<sup>1</sup> We acknowledge, of course, that some redactions or narrowly focused withholdings might ultimately be appropriate as the EPA processes the responsive records.

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If the EPA denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, the Requesters will accept a paper copy of responsive records.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at (202) 907-7945 or via e-mail at [brad@jamesmadisonproject.org](mailto:brad@jamesmadisonproject.org).

Sincerely,

/s/

Bradley P. Moss  
Deputy Executive Director

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